Transfer of Development Rights Report

South County Watersheds Technical Planning Assistance Project

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Prepared by Rick Taintor

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Dear Rhode Islander:

Rhode Island has many special places and the watersheds of Washington (South) County are no exception. Washington County provides habitat for 75% of all species found in Rhode Island, including the majority of the State's rare species. The EPA has designated all of Washington County as a sole source aquifer because it serves as the only source of drinking water for the residents. While 65% of the area is undeveloped, the county is the third fastest growing region in New England with a population increase of 20% in the last decade.

A University of Rhode Island survey determined that the top three priorities for South County local officials were 1. to protect public drinking water; 2. to more effectively plan for growth; and 3. to protect farmland and open space. To respond to these priority community goals, DEM, in partnership with the Rural Lands Coalition, the South County Planners, the Washington County Regional Planning Council and the South County Watershed Partnership, obtained a $100,000 EPA Grant to assist the Washington County communities in exploring more creative land use techniques to accommodate growth while minimizing impacts to the environment and community character. This project was a community-based effort where the scope of work and the hiring of consultants were done in consultation with local officials.

The land use techniques studied addressed issues such as: creating new growth centers to avoid sprawl, encouraging village revitalization and infill development, transferring development rights, preserving meaningful open space, and preventing strip commercial development. Other topics studied included strategies to encourage the continuation of agriculture and forestry and how to more effectively evaluate the environmental impacts of development. The purpose of the project was not to stop or impede growth but to develop better growth planning options. Since there are always many more special natural, cultural, and recreational resources that communities wish to protect than they have the funds to purchase, a major emphasis of this project was to demonstrate how proactive planning, with more flexible land use techniques and careful site design can preserve the environment and the quality of life for all Rhode Islanders. Dodson Associates, the consultants for the project used planning scenarios to illustrate how parcels will look under conventional versus creative land use techniques to make it easier for local officials to determine which land use techniques are best for their community. Model ordinances were also developed that correspond to each planning scenario to allow communities to implement the techniques that they may choose to adopt.

With these techniques, local officials and developers can work together to guide growth where it is most suitable from the context of the individual site, community and watershed. This project is another significant tool, along with land acquisitions, brownfileds cleanups and public education to assist Rhode Islanders to protect our natural resources and quality of life while growing efficiently in the future. The impressive results of this project are a tribute to working in partnerships where a broad based stakeholder group, comprised of community officials, planners, builders, realtors, farmers, landowners, watershed organizations, environmental groups and interested citizens collaborated to find solutions to concerns that were identified by the community. I commend the hard work and extra effort of the consultant team, EPA New England for their support, and the stakeholders of the project advisory committee who unselfishly volunteered their time to insure this project would be a success. I am pleased that DEM was able to assist and participate in this exciting effort that can be used by all Rhode Island communities to plan for growth to protect the environment and our quality of life.

Sincerely,

Jan H. Reitsma
Director

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INTRODUCTION - A UNIQUE PLACE AND TIME

The landscape of South County is unlike any other in the Northeast, if not the whole country. Thousands of years of glaciation, erosion, and gradual development of plant and animal communities, followed by centuries of human use and modification, have created a unique landscape, where geology, history, nature and culture enrich and enliven each other. Each of these elements creates a kind of order in the landscape that ties the whole together, and they interact in a hundred ways. The result is a landscape that is rich in both natural resources and physical beauty, with constant variation within the unifying structure of a few continuous themes. One of these themes, for example, concerns the movement of water across the landscape. Draining the long narrow upland valleys in the Northwestern towns of the county, the tributaries of the Pawcatuck River descend gradually to the sea. Backed up behind the hills left by the glacier's terminal moraine at the end of the last ice age, these streams are forced west, through a series of ponds and wetland systems, all the way to Westerly and the Little Narragansett Bay. This diverse landscape and the many native plant and animal species that depend on it would be special enough; adding immeasurably to the complexity and vitality of the scene is a different theme, one flowing from human use of the rivers, forests, and rich agricultural soils of the region over centuries of intensive settlement. Mill villages sprang up wherever water could be harnessed to turn a wheel; agricultural settlements and outlying farmsteads dot the uplands; harbor towns grew up to store and ship the crops and goods produced in the interior, and gather in the harvest of the sea. These two patterns, the one natural and the other human, or cultural – overlay each other and interact in a way that is both a visual historical record and an ongoing source of livelihood for South County's residents. The result is an extraordinarily beautiful landscape, a wonderful place to live, work, and recreate.

Of course, all this is threatened directly by the trends and forces that drive development in the modern age. In contrast to the historic development process, where homes and businesses, villages and towns grew up organically in balance with development of natural resources, agriculture and manufacturing, modern development is a market-driven process where land is bought wholesale, subdivided and sold at retail, often with little relationship to the underlying land. Planning and zoning are supposed to provide this connection, locating development where it is best suited and at appropriate densities. However, most communities have very rigid land use regulations that actually encourage or require developers to destroy the unique character defining features of the land without preserving any meaningful open space. These same inflexible zoning regulations also promote environmental impacts from development. The market, meanwhile, no longer finds as much value in the natural resources that are on the land – our lumber, food, fiber, and recreation are shipped in from elsewhere – so landowners can receive a greater economic return from selling their property for development.

Density and location aside, the pattern of development itself increasingly follows a simplified national model that seems alien to local traditions. Zoning based in the laudable goal of making development safe and predictable has the unintended consequence of reducing every landscape to the lowest common denominator, and favors developers who bring in simple cookie cutter subdivisions with wide, flat roads. In commercial development these same trends towards simplicity and homogenization are driven by engineering standards, as well as trademarked corporate architecture designed to be recognizable from coast to coast. At the same time the economies of scale favored by the market have led to ever larger buildings, culminating in the category-killing, big-box super stores now popping up on the edge of every town in the country.

Perhaps the largest factor in all of this is our dependence on the automobile. Driven by an understandable and almost universal individual goal of owning one's own car and home, corporate America and government at all levels have spent the last 50 years building highways and suburbs, and more suburbs and highways – draining the vitality from city centers and forcing a dependence on the automobile. Today many people can't get to work, shopping, schools, or recreation without cars. An investment of trillions in the interstate highways, together with inexpensive cars and the fuel to power them, supports an increasingly decentralized pattern of development. All of which is fine with most people, as long as there's enough money to repave the highways and buy the gas. Yet in metropolitan regions like Washington, DC, Atlanta, Los Angeles and San Francisco traffic congestion has doubled and tripled commuting times, turning a personal inconvenience into a drag on the economy. And it's not easy to put the genie back in the bottle after development has spread out across the countryside – which is why corporations, and their employees, are starting to take a second look at dense traditional cities like Providence, or regions like New York City, where millions of people have access to dependable mass transit systems. The economic advantage of regions that control their dependence on cars and trucks for transport of people and goods will be increasingly evident as energy prices continue to rise and subsidies for road construction and repair dwindle.

Despite these powerful national trends, and sprawl-inducing local zoning, South County remains mostly open and rural, with thousands of acres of undeveloped land and a high quality of life. A few key facts and figures from the Pawcatuck Watershed Partnership's Watershed Report help to set the scene:

- A population of about 60,000 people on 300 square miles, an increase of 20% in the last decade.

- Approximately 65% of the land is still undeveloped, of which 31% is already permanently protected natural habitat.

- 20% open farmland, most of it managed by 70 large-scale farmers.

- 80% covered by forest, including most of the 14% of the watershed that is wetlands.

- A mix of northern and southern plant and animal communities on a rich habitat, with 63% of Rhode Island's rare plants and animals.

- Underlying everything, an EPA-designated Sole-Source Aquifer – South County's only existing or potential future water supply.

South County thus represents a unique place at a unique time, a time when residents of the region still enjoy the benefits of its natural and cultural history, which are threatened as never before by development patterns that ignore that history and treat everything as a blank slate. A unique time because South County will never again have the chance to shape growth as much as it can now. And there isn't much time to talk about it: long before every house site and commercial zone is developed the unifying natural and cultural landscapes will be fractured and fragmented by a hundred small projects. What will be left is a region without the rural character that draws people here in the first place and makes for a high quality of life. It will feel much more suburban, with roads lined by commercial strips and subdivisions, and nature restricted to parks and preserves surrounded by houses -- not a bad place to live, but dramatically different from what exists today.

The South County Watersheds Technical Planning Assistance Project.

The problems of suburban sprawl are not unique to Rhode Island, of course, and planners at the state and local level have been working steadily to apply the lessons learned elsewhere to the local situation. In 1999 this effort crystallized around a project developed by a coalition of groups including the Rhode Island Department of Environmental Management, the Rhode Island Rural Lands Coalition, and the South County Planners. The idea was to prepare a comprehensive review of the best possible solutions from around the country and show how they could be applied locally. Under a grant from the US Environmental Protection Agency, this became the South County Watersheds Technical Planning Assistance Project. Under the management of the Sustainable Watersheds Office of Rhode Island DEM, a multi-disciplinary consultant team led by Dodson Associates was hired to do the project. Working with an Advisory Committee of more than sixty town planners, elected officials, and citizens that were selected by the nine South County towns, the consultants developed a suite of "Smart Growth" tools – including this study of Transfer of Development Rights, strategies to promote Farming and Forestry, the South County Design Manual, a set of Model Zoning Ordinances, and a Development Site Assessment Guide. Each of these products was designed to take the best examples from around the country and shape them into tools

that would be most effective in South County but could also serve as a model for other rural and suburban communities. Some, like the Design Manual, are primarily educational in nature; others offer specific tools and regulatory language for shaping development – it is hoped that together, these will help towns on many levels as they work to plan for growth in this unique corner of New England.

THE DESIGN MANUAL APPROACH

The Design Manual is a record of a process the Advisory Committee went through in order to identify the key issues and potential solutions to problems faced by South County Towns. From a list of about 25 possible sites, eight were chosen to represent a cross section of possible development types, transportation issues, environmental challenges and social contexts. Some of the sites, for instance, are directly off I-95, while others have potential rail access or are constrained by poor road connections. Some of the sites are within or on the edge of existing towns and villages, while others are out in the countryside. Ranging from tens of acres to several thousand, the sites also explore issues at a range of scales, from detailed issues of infill within a streetscape, to large-scale development patterns across a rural district.

Base maps and resource overlays were prepared for each site based on information from Rhode Island Geographic Information System. Aerial photographs of each area were taken to serve as the basis for illustrations. Grouping the sites by theme – residential, commercial, mixed-use, etc. – Dodson Associates led a series of workshops with the Advisory Committee to explore how each site could be developed. First, the group examined how each site would most likely be developed under current zoning regulations and market trends. For residential zones in South County, this usually means subdivision roads and one or two acre house lots. For commercial zones, the conventional development plan most often leads to development of frontage lots along existing highways – the commercial strip. The second scenario explored how it might be possible to fit the same amount of development on a site as allowed under the conventional plan, but in more creative and sustainable way. This often means allowing more of a mix of uses on sites, promoting pedestrian access, and encouraging flexible development standards within an overall master plan. Each of the design scenarios, then, is completely imaginary – but they are based on careful study of the physical and regulatory constraints that affect actual sites. As a result, many of the issues and problems inherent in developing in South County were identified early on, so that the consultants could look for potential solutions, whether through zoning changes, flexible development standards, planning concepts or detailed design approaches.

To illustrate these complex planning issues, and potential design solutions for each site, birds-eye view drawings were prepared that show both large-scale planning ideas and detailed design of streets, buildings, parking lots, etc. In each case, the first drawing illustrates existing conditions on the site. The second image shows what is likely to happen under current zoning and development trends. A third image illustrates a more creative approach, in many cases based on pedestrian-friendly, mixed-use development. The design manual is built around this set of three images of each site, surrounded by descriptive text and photographs illustrating existing conditions and examples of conventional and creative approaches to development. It is designed primarily as an educational resource, but could also be used as a reference in regulatory review of site planning and design.

THE CREATIVE VISION OF THE DESIGN MANUAL

Model Land Use Ordinances

As each of the planning and design scenarios were being developed and discussed by the steering committee, the consultant team worked to identify the planning, policy and regulatory changes that are needed to implement the creative plan. In most towns, zoning and other regulations make it impossible to build anything other than the conventional plan, at least by right. A set of alternative Model Zoning Ordinances, prepared by Attorneys Mark Bobrowski and Andy Teitz, was prepared to promote the creative development recommended in the design scenarios: they include elements to help towns more effectively plan for growth, particularly through better design review procedures, fees for design review, and growth rate controls; they also include alternatives to the usual forms of residential clustering and planned commercial districts that have failed towns in the past. The suggested models keep the basic idea of these older approaches, but go a step further, by promoting the idea of several different kinds of flexible and planned district development to be applied depending on the specific context of a project site. For example, the project team noted that the one-size-fits-all cluster zoning common to a number of towns treats all areas of a town alike. While it allows smaller lots and requires preservation of open space, it is a very blunt instrument in promoting better design. So the model ordinances suggest several alternatives customized to specific situations. In rural districts where preservation of large contiguous tracts of farmland, forest, or river corridors is paramount, a Conservation Subdivision Ordinance emphasizes site plans that reflect an understanding of town-wide open space systems. In village locations a different approach, termed Flexible Development, emphasizes the design of streets, houses, and neighborhood structure over open space protection, per se. Similarly, the models provide two different options for mixed-use commercial development in planned development districts, depending on whether the site is in the countryside or close to an existing village or town.

Working Landscape Preservation

The second implementation element was this report that outlines strategies to promote Farming and Forestry in South County. This study was prepared by Rick Taintor of Taintor & Associates, and combined regulatory approaches such as a Rural Village Development district, and an ordinance governing farm-based retail sales, with incremental approaches to promoting farm-based service businesses, lowering tax burdens on farmers, and generating local funding support.

Transfer of Development Rights

Another element prepared by Taintor & Associates was a study of the possible application of Transfer of Development Rights (TDR) to South County. TDR, as he describes it, "is a land use regulatory tool under which development rights can be severed from a tract of land and sold in a market transaction. The parcel from which the rights are transferred is then permanently restricted as to future development, and the purchaser of the rights may assign them to a different parcel to gain additional density…Usually, TDR programs designate sending areas from which rights may be transferred, and receiving areas to which the rights may be sent." This creative management tool takes the kind of flexibility that towns often allow to shift house lots around on one parcel, and makes it possible to transfer houses from one parcel to another elsewhere in the town. In theory this makes it possible to preserve sensitive farmland or open space entirely, without having to spend any public funds to buy it.

Site Assessment Guide

The last element prepared by the consultant team was prepared by Lorraine Joubert and Jim Lucht of URI Cooperative Extension. As part of a general study of best management practices for minimizing the effect of development on the environment, the URI-CE team developed a Rapid Site Assessment Guide that towns evaluate the suitability of sites for development. Utilizing the extensive data available from on the Rhode Island Geographic Information System, the Rapid Site Assessment system allows planners, developers and town boards to evaluate possible environmental impacts very early on in the development review process – heading off poor planning decisions before land owners and developers have spent a lot of money on site surveys and engineering.

PLANNING APPROACHES

As these different creative approaches to design, growth management and regulation were presented by the consultant team, it became clear that little is going to change without the support of town officials and private citizens. Better design or creative regulation won't be adopted as official policy without a shared consensus about what needs to be preserved and what needs to be developed. The only way to achieve that consensus is through comprehensive planning activities on both the town and regional scale. Planners in most towns, for example, realize that subdivisions often get built in the wrong places -- far from services, near sensitive wetlands, on poor soils, etc. Zoning usually requires larger lots in such places, but otherwise developers build the same subdivision roads out in the countryside as in the town center. The answer is to pursue planning at a more detailed scale within neighborhoods and districts within the town, figuring out ahead of time the areas should be protected, and the areas that are more suitable for development. This has been done in most towns at the scale of the whole town – the problem is the level of detail is rarely enough to show which parcels should be protected, much less delineating areas within parcels.

With the advent of Geographic Information Systems, and particular the data that is available from Rhode Island GIS, it is possible to do this kind of detailed planning for many times less than you could even ten years ago. A companion, called the South County Greenspace Protection Project, is designed to demonstrate how RIGIS data, and the knowledge of local volunteers, can be used to identify the areas and corridors of open space that should be protected within and between towns. A parallel project, known as the South County Economic Development Planning Project, is designed to complement the identification of desirable open space resources with an investigation of appropriate locations and types of economic development across the region. Both these projects represent regional planning at a scale and level of detail that can be truly effective in informing local planning and management decisions.

Improvements in the speed and efficiency of GIS will increasingly allow towns to pursue this kind of detailed physical planning as part of their comprehensive planning efforts. Now, most towns have a land use plan and zoning map, which shows the location, allowable uses, and density of development in each neighborhood. Few towns, however, talk about the appearance of the development, size and scale of structures, etc. This creates a lot of uncertainty. Zoning changes meet resistance because people don't know what to expect, there's no agreement ahead of time on anything but goals that are so broad to sometimes be meaningless. But, if you can establish specific, physical planning goals up front, zoning changes become much easier -- simply a tool to implement an accepted plan. In theory, zoning is meant to implement the land use element of the comprehensive plan, and in most towns there is an explicit connection; the problem is the landuse plan itself is rarely detailed or specific enough.

The purpose of this report is to evaluate the feasibility of implementing transferable development rights programs as a technique for managing growth in the Pawcatuck watershed. The report presents an overview of the TDR concept, an assessment of its feasibility in the South County area, and a draft TDR ordinance based on a potential strategy for the Town of North Kingstown.

What is Transfer of Development Rights?

Transfer of Development Rights, or *TDR*, is a land use regulatory tool under which development rights can be severed from a tract of land and sold in a market transaction. The parcel from which the rights are transferred is then permanently restricted as to future development, and the purchaser of the rights may assign them to a different parcel to gain additional density—for example, more residential units or more commercial floor area than would be allowed without the transferred rights. Usually, TDR programs designate *sending areas* from which rights may be transferred, and *receiving areas* to which the rights may be sent.

TDR programs are relatively new. With the exception of early programs in New York City and San Francisco, no program is more than 30 years old, and most were created in the 1980s and 1990s. TDR programs are concentrated in a few geographical areas: California, Florida, Pennsylvania and Maryland. Three of the most notable programs are located in the Northeast: New York City's program for protecting historic landmarks, and the environment-based programs in the New Jersey Pinelands and the Long Island Pine Barrens. However, TDR has not taken off in New England to any extent: only nine programs have been identified in the region (four in Massachusetts, three in Vermont, and two in Maine). Moreover, only one of these programs (Groton, MA) has resulted in more than one transfer, and that program does not conform to the typical TDR model since the transfers can be used to exempt a subdivision from an annual building cap as an alternative to gaining more density.

Although it is a relatively new and unfamiliar tool for most communities, TDR is related to several well-established aspects of land ownership and transfer. First, TDR is often described in relation to a "bundle of rights" that makes up land ownership. Among these rights is the right to develop the land subject to applicable regulatory controls. Establishment of a transferable development rights program allows this right to develop to be separated from the land and attached to a different piece of property.

Second, TDR is related to commonly-used tools such as conservation easements and agricultural preservation restrictions. In these more familiar measures, a transaction occurs between the landowner and a governmental or nonprofit entity in which the landowner voluntarily restricts the future use of the land in exchange for a payment. In effect, the entity that makes the payment acquires from the landowner some of the rights to use the land in order to extinguish those rights. Under TDR, a similar transaction occurs, but with two crucial differences: the purchaser is a private

landowner, and the development rights are transferred to the purchaser's property rather than being transferred to a state agency.

Third, TDR may also be thought of as an extension of the concept of cluster development (also called open space residential development or conservation subdivision design). Under the cluster approach, dwellings are grouped on a small area of a tract of land rather than being dispersed over the entire tract, with the remaining land being restricted from future development; thus, the right to develop the preserved open space may be considered to have been "transferred" from one portion of the tract to another. TDR takes the cluster development approach a step further by allowing this transfer of development rights not just within a single tract but between separate tracts that may be widely separated in space.

The analogy with cluster development may be taken further by comparing how the two techniques handle the total amount of development that is permitted. In most cluster development ordinances, the same number of house lots or dwelling units may be created in a cluster development as in a conventional development. However, some communities permit a higher overall density in a cluster subdivision than in a conventional subdivision. This "bonus" density may be provided as an incentive to use the cluster approach, or to promote other community goals such as the inclusion of affordable housing or public open space. Similarly, some TDR programs allow development rights to be transferred on a one-to-one basis: one additional unit is permitted on the "receiving" site for every unit removed from the "sending" site. Most TDR programs, however, incorporate some form of ratio to enhance the value of a transaction to both potential buyers and potential sellers, and thereby encourage landowners to participate in the program.

Why Use TDR?

Government regulation is a significant factor affecting the value of land. Government agencies can enhance the market value of a tract of land by designating the tract for uses that generate a greater economic return, such as businesses or high-density residential uses. Conversely, government can reduce the value of a tract by lowering the permitting intensity of use. A transferable development rights program attempts to balance these increases and decreases in value. It does this by providing incentives for landowners to buy and sell the rights to develop under the new regulations: in order to take full advantage of the increased development potential, owners of land that is designated for more intensive development must purchase the "surplus" development rights from the owners of land that is designated for less intensive development. Because of this market approach to addressing the economic impacts of land use regulation, TDR has been referred to as a way of trading the "windfalls" and "wipeouts" created by government actions.

TDR programs are generally implemented to further newly-evolved land use or resource protection objectives when it would be politically or legally problematic to implement these objectives directly.

For example, many communities are beginning to embrace "smart growth" models of development in place of older plans and regulations that have tended to promote sprawl. These newer approaches encourage the concentration of development in compact centers, such as existing or new villages or town centers, and discourage low-density residential and commercial development that would consume extensive amounts of open space. However, in most cases existing zoning actually promotes the low-density forms of development that the "smart growth" models attempt to avoid:

- Residential areas are zoned at typical suburban densities of less than two dwellings per acre (that is, with minimum lot requirements of one-half acre or more);
- In village areas and town centers, zoning regulations typically require larger lot areas, frontages and setbacks than are characteristic of the original settlement pattern, as well as requiring on-site parking lots which further lower densities and erode village land use patterns;
- Commercial areas are zoned along major arterials with site design standards that allow or encourage the provision of extensive parking lots serving a single property without good vehicular or pedestrian connections.

Because property owners have an expectation of the value of their land based on the development rights established under existing zoning, making dramatic changes in zoning that would reduce these rights is politically difficult and raises issues of equity and fairness. Allowing other property owners to benefit from increased density also raises issues of fairness, and in addition can create opposition from neighbors who expect that the existing land use pattern will be permanent. TDR provides a mechanism to address the equity and fairness issues by requiring the owners of land designated for increased density (i.e., than the underlying zoning) to purchase rights from landowners in the reduced-density areas.

It must be emphasized that a purely voluntary TDR program is a weak tool for implementing land use policies. With a voluntary program, the underlying zoning continues to express the "official" land use plan of the community, and achieving the preferred development pattern (for example, shifting development from farmland to villages) requires either a significant incentive package or landowners and developers who are exceptionally receptive to the concepts and objectives of the program. TDR is much more effective when it is established as a complement to a mandatory rezoning strategy than as a completely voluntary option to existing zoning.

TDR programs have been adopted to support a variety of preservation objectives. The earliest use of the technique, in New York City, was to protect historic landmarks; but most other programs are used either to protect environmental resources or to preserve open space. A number of programs in Maryland and Pennsylvania are used to preserve farmland, and programs in the New Jersey Pinelands and Long Island Pine Barrens are used to protect sensitive ecological resources. It is noteworthy that TDR programs have not been designed explicitly to promote compact development, although the increased density of a receiving area is a necessary complement to the reduced density in the sending area.

WHERE HAS TDR WORKED?

Successful TDR Programs in the United States

A comprehensive review of transferable development rights programs[1] documented 112 such programs in 107 communities (cities, towns, counties, and other jurisdictions) across the United States. More than half of these programs were in just three states: California (28), Florida (17) and Pennsylvania (13).

The study highlighted 18 programs that have been successful in terms of the number of transfers accomplished (see Table 1). With only a few exceptions (all in California), these programs fall into three categories: county-wide systems, large cities, and special environmental management areas. This reflects the fact that the area within which a TDR program operates should be of a significant scale relative to the real estate market if the program is to have a meaningful impact on the pattern of development. In a normal market for residential real estate this scale may be a large geographic area such as a county or a more extensive area such as the New Jersey Pine Barrens. In a hot market for commercial real estate, the scale may be at the level of a city or even a downtown area, such as New York City, San Francisco, or Seattle. In either case it is important that the scale of the TDR program be large enough to provide a large pool of potential sellers and purchasers. In addition, the geographic extent of the TDR program must encompass the competing development sites in the market; otherwise, developers may have little incentive to take advantage of the program.

Another characteristic of the successful TDR programs is that the underlying land use regulations are sufficiently restrictive relative to market demands to encourage participation. TDR is usually a voluntary program, and is more difficult to understand and move through than conventional development; therefore, the TDR program must offer significant benefits as incentives for land-owners to participate. Thus, it is not enough for a TDR program simply to allow the transfer of rights from a sending area to a receiving area. Rather, the program must provide options for both the sending and the receiving landowner that are not available outside the program. In the sending areas, for example, the land use regulations might prohibit residential development altogether or allow it only at a very low density, while the TDR program allows transfer of development rights as if the permitted density were much higher. Similarly, the zoning ordinance might allow moderate-density single-family dwellings as of right in the receiving areas, but permit higher-density development or multifamily dwellings with the purchase of development rights.

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[1] Rick Pruetz, *Saved* By *Development: Preserviing Environmental Areas, Farmland and Historic Landmarks With Transfer of Development Rights* (Burbank, CA: Arje Press, 1997)

Table 1: Successful TDR Programs

	Year Started	No. of Transfers	Acres Protected
COUNTIES			
San Luis Obispo County, California	1980s,1996	n.a.	n.a.
Boulder County, Colorado	1989	5	10,000+
Collier County, Florida	1974, 1979	n.a.	325
Dade County, Florida	1981	n.a.	n.a.
Calvert County, Maryland	1978	n.a.	5,000+
Montgomery County, Maryland	1987	200+	29,000
CITIES			
Cupertino, California	1984	30-40	n.a.
Los Angeles, California	1975, 1988	3-4	n.a.
Morgan Hill, California	1981	n.a.	92.5
San Francisco, California	1960s,1985	10+	n.a.
Denver, Colorado	1982, 1994	3	n.a.
Washington, D.C.	1984-1991	11±	n.a.
New York, New York	1968	n.a.	n.a.
Seattle, Washington	1985	9	n.a.
SPECIAL AREAS			
Malibu Coastal Zone, California	1979	505	800
Tahoe Regional Planning Agency, California/Nevada	1987	n.a.	n.a.
New Jersey Pinelands, New Jersey	1980	n.a.	12,834
Long Island Pine Barrens, New York	1995	0	0

Source: Rick Pruetz, *Saved* By *Development* n.a. = not available or not applicable

Criteria for a Successful TDR Program

The first question is, how should "success" be defined? This will depend on the individual community. Some may judge a program as successful if it results in the preservation of one farm, and certainly the protection of a small number of unique and valuable resources can be a legitimate objective. In this case, success can be defined as having one transaction, if it is the "right" transaction. However, if the TDR program is adopted with the intent of shaping community growth and development, so that new development is directed into centers and large outlying areas are preserved,

then “success” must be measured in terms of the number of transactions and the total acreage preserved.

There appear to be three categories of criteria that affect the success of a TDR program: these relate to (1) the real estate market in the area encompassed by the TDR program; (2) the regulatory structure underlying the TDR program; and (3) the capacity of the receiving areas to accommodate the increased intensity of development.

Real Estate Market

For a TDR program to affect the overall development pattern of a community or region, the program must encompass a large and active real estate market. First of all, the market must be geographically large enough that it will include most of the comparable sites for the type of development that the program is intended to affect. For example, a town-based TDR program that is intended to prevent suburban sprawl by restricting residential development in one area of the town may have little impact and few takers if land is available for subdivision a few miles away in a neighboring town. On the other hand, a TDR program that provides density bonuses in a major downtown district may give developers a strong incentive to negotiate to acquire transferable development rights from landowners in a sending area.

Second, the real estate market covered by the TDR program must be large enough so that there are sufficient numbers of potential purchasers and sellers of rights. If there are only a few landowners in the sending area, a developer in the receiving area may not be able to acquire development rights when he or she determines that the time is right for development, and may therefore decide to move ahead with development at the (lower) intensity allowed by the underlying zoning. Conversely, if there are only a few potential sites to receive development rights, a landowner in the sending area may not be able to find a purchaser at the time that he or she is making a decision regarding the future of a tract, and may develop it at the (low) density allowed by the underlying zoning rather than hold onto the land in the hope that a purchaser will turn up. In both cases, the objective of the TDR program will have been frustrated because of the lack of an effective market.

Finally, there must be a strong demand for development in the area. If only a few new homes or businesses are being built each year, there will be few potential TDR transactions and the program will have little impact on the overall pattern of development in the community or region.

If the intent of the TDR program is not to affect the overall development pattern of an area, but rather to protect a few key resource areas from development, the issues relating to the real estate market will be somewhat different. In such a case, the program can be successful as long as the landowners in the sending area are committed to the objective and the minimum number of sites in a receiving area can be located. This type of TDR program would require much closer, hands-on involvement by

the local government or by a non-profit organization dedicated to achieving the specific transfers, rather than depending on the workings of the real estate market.

Regulatory Structure

A basic premise of TDR is that some areas are designated for more intensive development and others for less growth. Therefore, most programs designate sending areas and receiving areas. Usually it is not difficult to identify sending districts: these are the areas in which the governmental jurisdiction wishes to achieve some non-development objective such as preserving farmland or other open space, or protecting sensitive environmental or historic resources. In these sending areas, the allowed uses and densities should be established by zoning at levels significantly below what market demand would indicate, in order to create an incentive for participation in the program.

If the planning area is relatively undeveloped, as is the case in many parts of the western United States, it may be easy to designate receiving areas as well. But in southern New England it can be politically difficult to designate existing developed areas, such as town or village centers, for more intensive development than the existing zoning allows. It may be easier to designate undeveloped locations for the creation of new centers, or to allow increased development intensity in locations that are less attractive for conventional residential development, such as areas adjacent to highway commercial districts. In any case, it is important that receiving areas be zoned so as to create a realistic market for transferred development rights.

The TDR program must offer a meaningful incentive to landowners and developers to participate in the program rather than develop according to the underlying zoning. This means that land uses and intensities in both the sending and receiving areas must be established at a lower level than the market would support, and that transfer ratios must be sufficient to induce landowners to buy and sell development rights. For example, in the New Jersey Pinelands, residential development in designated "Agricultural Production Areas" is restricted to one dwelling per 40 acres, while land in these areas may sell development credits at a ratio equivalent to approximately 8 dwelling units per 40 acres. Receiving areas in the Pinelands must permit total residential development through the use of TDR credits to be at least 50 percent greater than the base density allowed by the underlying zoning. Thus, the Pinelands program creates an 8-to-1 incentive for sending area landowners to sell their development rights, and at least a 1.5-to-1 incentive for receiving area landowners to purchase development rights.

Development Capacity of Receiving Areas

An essential element in the success of TDR programs is having areas to absorb the development represented by the development rights that are transferred from sending areas. As noted earlier, in established village or town centers this can be difficult to accomplish from a political perspective. Equally important, however, is the ability to accommodate a higher intensity of development with

public infrastructure and services. The most critical issues usually have to do with wastewater collection and treatment: if sewer systems are not present, allowing land use intensities greater than permitted under existing zoning regulations may be problematic. Other infrastructure issues that should be considered include the provision of public water supply and the capacity of local road networks.

ISSUES AFFECTING TDR FEASIBILITY IN SOUTH COUNTY

Zoning

In order for a TDR program to work, two aspects of zoning must be in place. In the receiving area, there must be a provision allowing an increase in development intensity when development rights are transferred to a tract of land. In the sending area, the basic use and intensity regulations must be restrictive relative to market demand, such that the transferable development rights assigned to a tract must be more valuable than the right to develop on the tract.

Under Rhode Island statute, overlay districts may only be used to add more restrictive requirements to the underlying zoning, and not to allow more flexibility.[2] Therefore, while the sending area could be restricted through the creation of an overlay district, it is probably not possible under the current statute to use an overlay district approach for receiving areas. Instead, it would be necessary to provide for an increase in density (with the acquisition of transferable development rights) through the land development project process, either by amending the existing zoning district regulations or by creating a new zoning district. (Another alternative would be to seek an amendment to the definition of "overlay district" contained in the General Laws.)

A significant challenge for local government officials is achieving political acceptability for the zoning changes needed to provide the incentives for an effective TDR system. These changes will be needed in both the receiving areas and the sending areas. In the receiving areas, a TDR program will need to provide for density increases of 50 to 100 percent: for example, a receiving area with half-acre minimum lot area requirements under existing zoning should allow 3 to 4 dwelling units per acre (whether as smaller single-family lots or in townhouse or apartment structures) with transferred development rights. Many residents view lot area requirements and density limitations as tools for controlling overall growth, and are therefore likely to be resistant to proposals for reducing minimum lot sizes in receiving areas. Residents in receiving areas are also apt to oppose increases in permitted densities because of the perceived impacts on neighborhood character and quality of life.

At the same time, many landowners in sending areas will be concerned about the increases in minimum lot areas that would be necessary to induce sales of development rights. For example, in an area with 3-acre minimum lot area requirements under existing zoning, the permitted density could be decreased to perhaps one dwelling per 10 acres, with the ability to transfer 3 or 4 development

[2] Rhode Island General Laws, Title 45, Section 45-24-31, definition (50): An overlay district "imposes specified requirements in addition to, but not less than, those otherwise applicable for the underlying zone."

rights to land in a receiving area. Over the long term, in theory, such a change should have a neutral or even positive impact on the owners of land in the sending area. However, these individuals are likely to view TDR as an untried and complicated program with no guarantee that they will be able to recover their equity by selling their rights; and they are likely to focus on the short-term impacts on their ability to use their property in the way that it has been zoned.

Scale

As noted earlier, a TDR program must encompass a significant portion of an active real estate market if it is to have a meaningful influence on development patterns. At the town level in South County this condition probably cannot be met. The real estate market in this area is indeed an active one, particularly in the West Bay communities. However, there are probably not enough transfers within one community for TDR to affect the overall pattern of growth; and without strong incentives on both sides there may not be enough potential purchasers of development rights to encourage potential sellers to participate.

Moreover, the local real estate markets in South County are not independent of each other, but rather are subsets of larger regional markets that are defined by the major highway routes (Routes 4 and 1 along the coastline, and Interstate 95 running through the interior). This means that there is some degree of interchangeability among parcels in different towns from the perspective of potential buyers. As a consequence, development restrictions within one community can have a ripple effect in adjacent communities: for example, a downzoning in an part of town designated as a TDR sending area might shift demand to another community rather than (or in addition to) stimulating the TDR program.

A TDR program would have a greater likelihood of success if it were established on a regional scale, for example, at the state or county level or through a consortium of towns. By encompassing a larger portion of the real estate market, a regional program would would have two benefits: the numbers of potential buyers and sellers within the TDR market area would be increased, and the number of alternative sites outside the market area would be reduced. To establish such a program, however, would require the creation of a regional land use regulation system in addition to existing permitting authority at the local level. Such a regional system would entail amendments to the State Zoning Enabling Act. Even more problematic would be creating a revenue-sharing system to resolve the intermunicipal fiscal impacts that would arise from shifting development across town borders.

Disregarding the larger issue of “smart growth” (that is, managing the overall pattern of development within the community or region), TDR might be useful within a single town for protecting specific environmental, historic or aesthetic resources. In this case, the TDR program would be targeted to individual landowners and would involve a more directed program of outreach and negotiation, rather than depending on the workings of the real estate market to achieve its objectives.

When there are fewer potential purchasers and sellers of development rights, it becomes more important to provide a banking system for rights. This gets around the problem of timing when a landowner must decide whether to develop the land with or without a transfer of development rights, and there are few or no potential purchasers of the development rights. The ability to pay the owner for development rights also helps to avoid a "taking" claim if the property's use or development intensity has been restricted compared to similar neighboring properties.

Infrastructure Capacity

Few locations in the watershed are sewered, which creates an obstacle to allowing increased densities for receiving areas. This is not an insuperable hurdle, as developers can and do provide wastewater collection and higher levels of treatment where the permitted densities and market demand create a financial incentive to do so. There is an increasing acceptance of small wastewater treatment plants (so-called "package systems") to allow clustering of development on smaller lots where the alternatives would be to provide public sewering or to require large-lot development with less design flexibility.

Nevertheless, the lack of sewers does make it difficult to use TDR as a mechanism to promote infill development in or adjacent to village and town centers. Many existing town centers in South County could not be replicated today under current land use and environmental regulations, and incremental development of individual lots does not provide the predictable revenue streams that allow subdivision developers to finance wastewater treatment systems. Therefore, without a separate strategy for providing wastewater collection and treatment, it is unlikely that receiving areas for transferable development rights can be defined in or around existing centers.

Institutional Capacity

A TDR program requires a significant level of staff support for both administration and promotion. On the administrative side, the local government (or the regional agency if the program is established at the regional level) must determine the development rights that exist on the sending and receiving parcels and the number of development rights that may be transferred; coordinate the transfer of development rights with the local zoning review and approval process; and maintain records of all transferred rights. This requires the involvement of the planning board or commission as well as the town clerk, whose responsibility for the recording of deeds will be extended to include recording of certified and transferred development rights. In addition, if a development rights bank is created to purchase and sell rights, the entity managing the bank (for example, a local or regional land trust) will be involved in many of the transfers.

The promotional role is equally important, because of the novelty of the TDR concept and the complexity of the TDR process. It is essential to reach out actively to those who will be directly

involved in the land development process, including landowners, developers, real estate brokers, bankers, and design professionals (planners, landscape architects and engineers). This role could be taken on by a variety of actors, including local planners, land trusts, and specialists from the University of Rhode Island.

The institutional capacity to undertake these efforts varies widely across South County. Because property deeds are registered in the offices of town clerks, each community has the capacity to manage the recording of transferred development rights; and the existing town planning staff is probably sufficient to handle the likely volume of TDR activity in the short term. However, promoting a TDR program and educating landowners and developers about the process are time-consuming activities that will may exceed local government resources.

Conclusions

Local TDR Programs

TDR can be a useful tool for South County communities that want to protect specific areas within their boundaries from development, provided that they can identify appropriate sending areas and provide the zoning incentives. Such a program can be successful if it includes (a) real restrictions on the use of land in the area to be protected (the sending area), and (b) strong incentives in terms of increased development potential in the receiving area.

A town can further enhance the feasibility of a TDR program by establishing a system for banking development rights to resolve the timing issue that occurs when a landowner in the sending area is ready to participate but no potential buyers are ready to purchase those rights. The development rights bank might be funded through a state open space grant or a local bond issue; and it could be administered in cooperation with a local or regional land trust to enable individual transactions to move forward more quickly and without the potential for political complications. It may be easier to determine appropriate funding levels for a development rights bank when the town has identified specific parcels in a relatively small sending area than when a larger sending area with many potential parcels is defined.

Regional TDR Programs

A regional TDR program for South County could conceivably be created through the voluntary participation of communities in an intergovernmental organization. However, it is difficult to imagine what the incentive would be for one town to voluntarily accept additional residential development in order to provide a receiving area for development rights from another community. In any case, the town would already have the ability to allow increased residential or commercial development without participation in a regional program.

On the other hand, a regional TDR program might be a useful tool if restrictions on overall development within a region such as a watershed were necessary for management of environmental resources. In this case, a base allocation of development credits might be assigned to each community within the watershed on the basis of land area and other factors, and then a town that had the capacity and the willingness to accommodate more growth than assigned to it could be designated as a receiving area. This is the model that is used in the New Jersey Pinelands and the Long Island Pine Barrens, which are among the most successful programs in the country.

If a regional TDR program were established as part of a regional environmental management strategy, it would have to include the following measures:

- Classification of land within the program's coverage area in terms of development capacity, based on environmental factors (perhaps in combination with other regional growth policies);
- Allocation of development rights within each land classification type in terms of maximum density, both with and without development rights transfers;
- A mandate that local governments update their zoning ordinances to be consistent with the regional land classification system, and to accommodate and promote development rights transfers;
- Establishment of a development rights bank with an initial funding amount sufficient to accommodate anticipated demand in the first two years of the program;
- Creation of a new entity, or designation of an existing entity, to administer the TDR program and serve as a clearinghouse for information for interested buyers and sellers;
- Consideration of a revenue transfer program to address fiscal inequities that could result from shifts in regional growth among communities.

This type of approach would obviously require that the state government take a much stronger role in local land use regulation than it currently does, and it would raise a wide range of policy questions about local autonomy and municipal finances. Although the viability of such a program has been demonstrated in other states and regions, the case for such a regulatory shift in Rhode Island has not been made at this time.

A POSSIBLE TDR PROGRAM FOR NORTH KINGSTOWN

The Town of North Kingstown has investigated the potential for creating a Transfer of Development Rights program, and it was decided to use the town as a case study for the application of TDR concepts in South County. Thus, this report presents a "model" ordinance in the context of North Kingstown's existing zoning ordinance.

TDR Program Criteria and Context

At the outset, the Town's Planning Department defined two key criteria for a TDR program:

- There should be no increase in total residential buildout unless the development impacts are not increased. That is, an increase in the total number of dwelling units might be considered if there were a limit on occupancy (e.g., elderly housing rather than families) or on the total number of bedrooms.

- As an exception to the above criterion, the town might allow a limited increase in residential buildout in specific locations where residential use would be more appropriate than nonresidential uses allowed by current zoning.

The Town identified one potential sending area in the southwest corner of the community (Slocum), consisting of a grouping of large parcels of farmland and other open space. The area totals approximately 1,500 acres in area and is estimated to have a buildout of 260 house lots under the existing zoning (5-acre minimum lot area).

The Town also identified two receiving areas. The first receiving area is a 284-acre gravel extraction area that is currently zoned for industrial use but is adjacent to residential neighborhoods. In this case, residential use of the site, even at a relatively high density, might be more appropriate than the uses for which the land is currently zoned; and the TDR program might serve as an incentive to residential development. The second receiving area, in the Quonset Point/West Davisville area, was identified based on the availability of sewers. It was suggested that TDRs could be used to authorize increases in commercial building densities in this area, as well as to permit residential use of an 8-acre site that was formerly the location of a drive-in theater.

Regulatory Approach

As noted previously, the overlay district approach is not be appropriate for receiving areas in Rhode Island because of the way in which state statute authorizes overlay districts. Therefore, it is recommended that three new zoning districts be created: one for the sending area, and two for the receiving areas.

Sending Area

In the Sending Area, it is recommended that the maximum allowed development intensity be set at one dwelling unit per 10 acres (i.e., half the currently permitted density). At the same time, development credits should be assigned to the land at the rate of one dwelling unit per two acres. The intent of this approach is to significantly reduce the development potential on the land in the sending area, while providing an incentive to owners to transfer their development rights rather than develop at the lower density.

From the perspective of the landowner in the sending area, this approach would have the following impacts:

- For every 10 acres of land included in the new zoning district, the owner would lose the right to develop one lot;
- However, the owner would gain 5 transferable development rights for every ten acres, which could be sold to owners of land in a receiving district;
- Upon selling the development rights, the owner would permanent restrict the sending area tract from any residential development;

From the perspective of the Town, the transfer would have the impact of increasing the total buildout by 3 dwelling units per 10 acres (the 5 transferable rights, less the 2 units per acre previously allowed), but the increased number of dwelling units would be located in areas of town that are more appropriate for development. As indicated in Table 2, the estimated total impact on the town ranges from a reduction of 130 dwelling units at buildout (if no landowner in the sending area transfers any development rights) to an increase of 390 units (if all potential development rights are transferred to residential uses in the receiving areas). In the latter case, the program would result in the permanent protection of nearly 1,500 acres of farmland and open land.

Table 2: Development Capacity – Sending Area

Plat #	Available Land Area	Potential New Lots With Minimum Lot Area of …		
		5 Acres (Existing Zoning)	10 Acres	2 Acres
5	119.75	17	9	42.5
6	87.5	23	11	57.5
8	229.61	25	12	62.5
9	77.66	12	6	30
11	151.76	25	13	62.5
12	227.73	40	20	100
14	241.65	72	36	180
23	84.4	15	7	37.5
24	90.47	7	4	17.5
25	132.65	18	9	45
28	53.76	6	3	15
Total	1,496.94	260	130	650.00

Source: North Kingstown Planning Department

Table 3: Development Capacity – Receiving Area #1

Plat–Lot	Vacant Area	2 Acre	5 Acres	10 Acres
105–1	3.42	1	1	1
105–2	120.5	50	20	10
105–3	75.1	25	10	5
81–2	84.83	30	12	6
Total	283.85	106	43	22

Source: North Kingstown Planning Department

Table 4: Development Capacity – Receiving Area #2

Plat #	Vacant Area	1/2 Acre	1/4 Acre
147–89	7.76	14	28
Total	7.76	14	28

Source: North Kingstown Planning Department

Receiving Areas

In the Dry Bridge Road receiving area (the industrially-zoned gravel pit) it is proposed to allow residential development at a density of 1 dwelling unit per 2 acres, provided that a development right is acquired for every dwelling unit and that the development is clustered to avoid aquifer impacts. (Residential development is currently not permitted by the industrial zoning of this area.) As indicated in Table 3, the estimated potential impact of the TDR provision is the creation of 106 dwelling units, which would be partially balanced by the reduction of 42 dwelling units in the Slocum sending area.

In the Quonset Point / West Davisville receiving area, it is proposed to allow commercial development at higher densities if development rights are purchased from the Slocum sending area. By allowing residential development rights to be converted to nonresidential rights, and by allowing higher density in commercial developments that use transferred rights, the TDR program would encourage revenue-positive nonresidential development in areas served by sewers.

It is recommended that the base floor area ratio in the receiving district be established at 0.30: that is, 3,000 square feet of gross floor area could be constructed for every 10,000 square feet of land area. With transfer of development rights, the maximum building height would be increased from 35 feet to 50 feet and the maximum floor area ratio would be increase to 0.45. Each residential development right purchased would be converted to commercial/industrial development rights at the ratio of 2,000 square feet of gross floor area per dwelling unit.

As an example, consider a 10-acre parcel in the receiving area. Under the base zoning regulations, this parcel could support 130,680 square feet of gross floor area (10 acres x 43,560 square feet per acre x 0.30 floor area ratio). The maximum potential floor area with transfer of development rights would be 196,020 gross square feet (10 acres x 43,560 square feet x 0.45 floor area ratio), which would require the purchase of 33 residential development rights:

196,020 sq. ft. with TDR purchase
– 130,680 sq. ft. base density
= 65,340 sq. ft. increase
÷ 2,000 sq. ft. per TDR
= 32.7 development rights

If all available development rights in the Slocum sending area were converted to commercial development rather than being transferred to residential development in the Dry Bridge Road area, the maximum increase in commercial development would be 1.3 million square feet.

Finally, within the West Davisville area, the eight-acre former drive-in theater site might be considered for residential development as an alternative to the business uses for which the site is

currently zoned. At an overall density of 4 dwelling units per acre with purchase of development rights, this site could accommodate 28 to 30 dwelling units, which would enable the preservation of 6 acres of land in the sending area.

Transfer of Development Rights Ordinance

The following ordinance establishes the elements of the TDR program outlined above. Note that in addition to this ordinance, new zoning districts must be created elsewhere in the zoning ordinance for the sending and receiving areas establishing the use and intensity regulations applicable in each district with and without transfer of development rights.

ARTICLE XXII. TRANSFER OF DEVELOPMENT RIGHTS

Sec. 22-1. Purpose

The purpose of this section is to provide a mechanism for transferring development rights between zoning districts, in order to achieve the following objectives:

(a) To encourage compact development in designated Receiving Areas;

(b) To discourage development in designated Sending Areas, so as to protect the environment, preserve open space, reduce traffic congestion, and minimize the need for public spending on infrastructure expansion;

(c) To conserve public funds by concentrating development in areas where public infrastructure and services may be most efficiently provided;

(d) To balance long-term tax revenue reductions in areas planned for limited development with long-term revenue increases in areas planned for concentrated development; and

(e) To accomplish the above objectives in a manner in which landowners are compensated for reductions in long-term development potential, through transfers with other landowners who benefit from increases in development potential.

Thus, the provisions of this section are intended primarily to change the pattern and location of future development within North Kingstown, rather than to change the overall amount or type of such development; and to accomplish such intended changes in a way that is equitable to property owners.

Sec. 22-2. Sending Districts

The following areas are hereby designated as Sending Districts:

- The Slocum Sending District, consisting of all land in Plats 5, 6, 8, 9, 11, 12, 14, 23, 24, 25, and 28.

Sec. 22-3. Receiving Districts

(1) The following areas are hereby designated as Receiving Districts:

- The Dry Bridge Road Receiving District, consisting of all land in Plat 105, Lots 1, 2, and 3; and Plat 81, Lot 2.

- The Quonset Point–West Davisville Receiving District as shown on map __, consisting of all land within 1/4 mile of a sewer main line as of January 1, 2001.

- The West Davisville Special Receiving District, consisting of Plat 157, Lot 89.

(2) Within the Dry Bridge Road Receiving District, the transferred rights shall permit the development of single-family dwellings at an overall density of one-half dwelling unit per acre, provided that said dwellings are developed in a cluster development pursuant to Article IX.

(3) Within the Quonset Point–West Davisville Receiving District, the transferred rights shall permit an increase in maximum building height from 35 feet to 50 feet, and an increase in total floor area above the baseline floor area ratio (FAR) of 0.30, but not exceeding a maximum FAR of 0.45. Residential development rights shall be converted to nonresidential rights at a rate of 2,000 square feet of floor area per residential right.

(4) Within the West Davisville Special Receiving District, the transferred rights shall permit residential development at an overall density of 4 dwelling units per acre.

Sec. 22-4. Establishment of Sending Area Development Rights

(1) Development rights are established at the following ratios:

- Slocum Sending District: One-half (1/2) transferable development right per acre.

(2) The establishment of development rights in this section shall not create the right to develop on the land at a greater intensity than permitted by the underlying zoning.

Sec. 22-5. Certificates of Development Rights

(1) Development rights shall be created and transferred by means of Certificates of Development Rights (CDR's) in a form approved by the Planning Commission. The CDR shall specify the amount of development rights to which the owner of the Certificate is entitled, expressed in number of dwelling units for residential development rights and in net floor area for non-residential development rights. CDR's shall be issued by the Planning Commission according to the provisions of this section and may be sold to any person, corporation or other legal entity. Development rights shall be considered as interests in real property and may be transferred in portions or as a whole.

(2) Procedure for Obtaining Certificates of Development Rights – An owner of land in a Sending District may apply for a determination by the Planning Commission of the development rights that are permitted on the property according to the calculations specified in section 22-4. The Planning Commission may forward the application and accompanying plans to other municipal boards and officials for review and comment prior to making its determination. Within forty-five (45) days of submission of an application for a determination, the Planning Commission shall make its determination in a regular meeting, and shall issue a CDR specifying the Development Rights for the property in question.

(3) Recording of Certificates with the Town Clerk – The Planning Commission shall forward a copy of an approved Certificate of Development Rights to the Town Clerk. The Town Clerk shall maintain an official register of such certificates and said register shall be made available for public inspection in the Town Hall. Said register shall also reflect any transfers of development rights which have been recorded in the Town Clerk's office as specified in section 22-6.

Sec. 22-6. Transferring Development Rights

(1) A landowner in a Receiving District may purchase some or all of the Development Rights of a lot in a Sending District as specified on the Certificate of Development Rights, at whatever price may be mutually agreed upon by the two parties.

(2) The transfer of development rights shall increase the permitted intensity of development of the lot in the Receiving District, subject to the intensity regulations of the zoning district within which the receiving lot is located.

(3) An application for a building permit, as well as a submission of a site plan or development plan, for a lot of land in a Receiving District shall include documentation of the proposed transfer of development rights, including the property from which the development rights are derived and the amount of development rights proposed to be utilized in the Receiving District.

(4) Recording of the Transfer – Prior to the issuance of any building permit for land in the Receiving District, where the proposed development would include net floor area in excess of the maximum amount permitted based on the applicable floor area ratio, the following two documents must be submitted:

a) The owner of land in the Receiving District, who has acquired the development rights, shall file with the Town Clerk four copies of an executed deed of transfer of the development rights from the property in the Sending District. The Town Clerk shall record the deed and shall forward one copy each to the Planning Commission, Building Official, and Tax Assessor.

b) The owner of land in the Sending District, who has transferred said development rights, shall file with the Town Clerk an irrevocable restrictive covenant running with the land permanently restricting the amount of development that may occur on the property. The covenant shall be recorded with the deed for the land from which the development rights are transferred, and a copy of the covenant shall forthwith be sent to (1) the Planning Commission; (2) the Building Official, who shall keep a record that the lot in the Sending District shall be restricted with regard to future development; and (3) the Tax Assessor, who shall adjust the assessed value of the property in the Sending District based upon the decrease in the development potential of the land.

APPENDIX: EXAMPLES OF TDR ORDINANCES

Acton, Massachusetts (Adopted in 1990)

_. *Transfer of Development Rights*

_.1 Purpose – The purpose of this section is to provide a mechanism for transferring development rights between zoning districts, in order to achieve the following objectives:

a) To encourage compact development within defined village centers, reinforcing Acton's traditional pattern of development and providing convenient and attractive commercial and personal service centers for residents of Acton's neighborhoods;

b) To discourage excessive development in the Great Road corridor, so as to reduce traffic congestion and minimize the need for public spending on infrastructure expansion;

c) To conserve public funds by concentrating development in areas where public infrastructure and services may be most efficiently provided;

d) To balance long-term tax revenue reductions in areas planned for limited development with long-term revenue increases in areas planned for concentrated development; and

e) To accomplish the above objectives in a manner in which landowners are compensated for reductions in long-term development potential, through transfers with other landowners who benefit from increases in development potential.

Thus, the provisions of this section are intended primarily to change the pattern and location of future development within the Town, rather than to change the overall amount of type of such development; and to accomplish such intended changes in a way that is equitable to affected property owners.

_.2 Sending Districts and Receiving Districts

2.1 Development rights may be transferred from sending districts to receiving districts.

2.2 The Sending Districts shall include: (a) the Limited Business (LB) district, and (b) all residentially-zoned parcels fronting on Great Road (excluding those in the Residential A district) for a depth of 500 feet from the layout line of Great Road;

2.3 The Receiving Districts shall include the North Acton Village (NAV) and East Acton Village (EAV) districts.

2.4 The objective of the transferable development rights mechanism is to achieve different development densities than the maximum FLOOR AREA RATIOS set forth in the Table of Dimensional Regulations (Section 5). The preferred densities are FAR's of 0.10 in the Sending Districts, and 0.30 in the Receiving Districts.

_.3 Certificates of Development Rights – Development rights shall be created and transferred by means of Certificates of Development Rights (CDR's) in a form approved by the Planning Board.

The CDR shall specify the amount of development rights to which the owner of the Certificate is entitled, expressed in number of dwelling units for residential development rights and in NET FLOOR AREA for non-residential development rights. CDR's shall be issued by the Planning Board according to the provisions of this section and may be sold to any person, corporation or other legal entity. Development rights shall be considered as interests in real property and may be transferred in portions or as a whole.

3.1 Procedure for Obtaining Certificates of Development Rights – An owner of land in a Sending District may apply for a determination by the Planning Board of the development rights that are permitted on the property according to the calculations specified in section __.4. The determination shall not require a public hearing or notice to the abutting property owners but shall be made in a regular meeting. The Planning Board may forward the application and accompanying plans to other municipal boards and officials for review and comment prior to making its determination. Within forty-five (45) days of submission of an application for a determination, the Planning Board shall issue a CDR specifying the Development Rights for the property in question.

3.2 Recording of Certificates with the Town Clerk – The Planning Board shall forward a copy of an approved Certificate of Development Rights to the Town Clerk who shall keep an official register of such certificates, and said register shall be made available for public inspection in the Town Hall. Certificates of Development Rights once exercised for purposes of development shall be cancelled by the Clerk immediately thereafter, and a note to that effect shall be made in the register.

3.3 Transferring Development Rights

a) A landowner in a Receiving District may purchase some or all of the Development Rights of a LOT in a Sending District as specified on the Certificate of Development Rights, at whatever price may be mutually agreed upon by the two parties.

Commentary

Maximum floor area ratios in the Village districts are based on the relative amount of residential and nonresidential floor area on each lot. The computation of maximum FAR's blends a maximum nonresidential FAR of 0.25 with a maximum FAR for residential uses of 0.40. The resulting combined FAR's range from approximately 0.29 for a lot in which 75 per cent of the floor area is commercial, to 0.36 for a lot in which 75 per cent of the floor area is residential.

b) The transfer of development rights shall increase the permitted intensity of development of the LOT in the Receiving District; provided that a transfer of development rights from a Sending District shall not result in a FLOOR AREA RATIO for any LOT in a Receiving District greater than the sum of (1) the nonresidential FLOOR AREA divided by the total FLOOR AREA multiplied by 0.30, plus (2) the residential FLOOR AREA divided by the total FLOOR AREA multiplied by 0.45.

c) An application for a building permit, as well as a submission of a final Site Plan (if applicable), for a LOT of land in a Receiving District shall include documentation of the proposed transfer of development rights, including the property from which the

development rights are derived and the amount of development rights proposed to be utilized in the Receiving District.

3.4 Recording of the Transfer – Prior to the issuance of any BUILDING permit for land in the Receiving District, where the proposed development would include NET FLOOR AREA in excess of the maximum amount permitted based on the applicable FLOOR AREA RATIO, the following two documents must be submitted:

a) The owner of land in the Receiving District, who has acquired the development rights, shall submit to the Building Commissioner four copies of an executed deed of transfer of the development rights from the property in the Sending District. The Building Commissioner shall forward one copy each to the Planning Board, Town Clerk and Tax Assessor.

b) The owner of land in the Sending District, who has transferred said development rights, shall file with the Register of Deeds of Middlesex County an irrevocable restrictive covenant running with the land permanently restricting the amount of development that may occur on the property. A copy of the covenant shall forthwith be sent to (1) the Planning Board; (2) the Town Clerk, who shall make an entry in the official register; (3) the Building Commissioner, who shall keep a record that the LOT in the Sending District shall be restricted with regard to future development; and (4) the Tax Assessor, who shall adjust the assessed value of the property in the Sending District based upon the decrease in the development potential of the land.

_.4 Calculation of Development Rights in Sending Districts

4.1 Intent – Landowners in Sending Districts are allowed to build to the full intensity permitted by the provisions of the underlying district, subject ot other applicable regulations. However, as an incentive to limit the total amount of FLOOR AREA along Great Road and to encourage the transfer of development rights to the Village Districts, a ceiling is established on the number of parking spaces that may be provided on a LOT in the Sending Districts. Landowners may voluntarily choose to limit the amount of BUILDING area erected on the site and sell the unused development rights to buyers who may transfer these rights to a Receiving District.

4.2 Determination of the Total Development Rights for a LOT – The total amount of development rights pertaining to the LOT shall be computed as follows:

a) Nonresidential districts – the MAXIMUM NET FLOOR AREA as computed in Section 10.4.3.6 of this Bylaw, less any development rights previously transferred to any LOT or LOTS in a Receiving District.

b) Residential districts – the number of DWELLING UNITS determined in accordance with the procedures for determining the maximum number of BUILDING LOTS permitted in an Open Space Development, as set forth under Section 4.2.3.2.

4.3 Adjustments in the Amount of Development Rights – The development rights shown on the Certificate available for sale and transfer shall be equal to the total development rights

determined by the preceding section, less any FLOOR AREA or dwelling units in existence at the time the determination is made. Whenever there is a change in the status of the development rights on a property (e.g., an existing building is razed) a landowner may apply to the Planning Board for a change in the Certificate. Upon submission of proof of the change in status of the property, the Planning Board shall issue a new Certificate accurately reflecting the development rights of the property in question.

Commentary

In order to address development concerns along Great Road, the zoning for the corridor was directed to the principal problem created by continuing expansion of commercial activity – that is, traffic volumes. Since there is a close relationship between the number of vehicles entering a site and the number of vehicles that can be accommodated on the site by available parking spaces, the bylaw established a ceiling on the number of parking spaces. This ceiling, one parking space per 3,000 square feet of developable site area, is calibrated to be equivalent to the traffic generation of retail space developed at a floor area ratio of 0.10.

4.4 Maximum Number of Parking Spaces Permitted – Unlike other districts where a *minimum* number of parking spaces must be provided for various USES, in Sending Districts the parking spaces required to be provided may not exceed a *maximum* number. Regardless of the number of dwelling units or the amount of NET FLOOR AREA specified on a Certificate of Development Rights approved by the Planning Board, the number of parking spaces that may be constructed on a LOT in a Sending District shall not exceed a ratio of one parking space per 2,000 square feet of DEVELOPABLE SITE AREA.

Commentary

This paragraph authorizes the transfer of development rights from a lot in the Sending District.

4.5 Calculating Development Rights That May Be Transferred – In lieu of constructing the total allowable NET FLOOR AREA or number of dwelling units determined in section __.4.2, with the maximum number of parking spaces calculated in section __.4.4, an applicant may choose to build at a lower intensity, and the difference in NET FLOOR AREA or dwelling units between what is allowable and what is actually proposed shall constitute the transferable development rights. The number of parking spaces to be provided on the site shall be determined by the minimum parking space standard as long as the maximum number of parking spaces permitted is not exceeded.

Commentary

The bylaw attempted to encourage higher-density mixed-use development in village centers by allowing nonresidential development rights to be converted to residential rights and then allowing higher densities for mixed-use developments. However, the Town was concerned about commercial over-building, and therefore did not allow conversions from residential to nonresidential development rights.

4.6 Conversion to Other Uses – The development rights shown on a Certificate of Development Rights may be transferred to a property in a Receiving District. These rights may be used for the same USE as that from which they are derived in a direct one-for-one relationship, or they may be converted to other USES. Non-residential development rights may

be converted into residential development rights by dividing the non-residential NET FLOOR AREA in square feet by a conversion factor of 1,000 square feet per dwelling unit to yield the number of dwelling units which may be transferred to a Receiving District. Residential development rights may not be converted to non-residential rights.

_.5 Exemption from Minimum Off-Street Parking Requirements – In a Sending District, the Planning Board may grant a special permit for a USE that would otherwise require more parking spaces than the maximum number permitted under Section __.4.4. The application for a special permit under this provision shall include a parking management plan, which shall set forth a program to reduce parking requirements and trip generation, and to prevent off-site parking. Particular care shall be taken to demonstrate that there will be no adverse impact on the surrounding neighborhood from parked cars associated with the development. Planning Board approval of the special permit shall represent an exemption from the minimum parking requirements applicable to the proposed USE, and may be include appropriate conditions and safeguards to ensure that all parking requirements are met on-site. No exemption from the maximum parking ratio requirements of Section __.4.4 shall be granted.

Commentary

As provided for under Article 8, lots in the Village districts which exceed the underlying floor area ratio of 0.20 must contain a mix of residential and nonresidential uses (Section 5.4.7).

_.6 Mandatory Mix of Uses With Increased Floor Area

6.1 The transfer of development rights option may not be used solely to increase the allowable NET FLOOR AREA of a single USE permitted in the underlying district. Any LOT which is permitted an increase in NET FLOOR AREA above the maximum NET FLOOR AREA set forth in the TABLE OF DIMENSIONAL REGULATIONS must include contain a mix of residential and nonresidential USES such that (a) residential USES shall comprise at least 25% of the NET FLOOR AREA on the LOT; (b) nonresidential USES shall comprise at least 25% of the NET FLOOR AREA on the LOT; and (c) no single nonresidential USE shall comprise more than 75% of the NET FLOOR AREA on the LOT.

Different USES may be apportioned between two or more buildings provided all the buildings are functionally integrated through the use of attractive open space and pedestrian walkways. Combined residential and nonresidential structures are permitted provided that the residential portions of such structures are located above the nonresidential portions.

6.2 Required Off-Street Parking – The number of parking spaces to be provided for a mixed-use development in a Receiving District shall be equal to 85 per cent of the sum of the number of parking spaces for each USE on the LOT, determined separately for each USE based upon the standards set forth in Section 6.

The Cape Cod Commission, Massachusetts (Model Bylaw)

1.0 Purpose and Intent:

This bylaw enables the transfer of development potential from one parcel to another. The transfer of development rights makes it possible to greatly restrict or even prohibit development entirely in one area (called the Preservation or Sending District) where there is a sensitive resource, such as a wellhead protection area, and transfer those development rights to another area (called the Receiving District) where there are little or no impediments to higher density, such as an "urban core" with public water and sewer. The density is transferred from a "sending" parcel to a "receiving" parcel.

By creating receiving parcels as markets for the sale of unused development rights in the sending parcels, TDR programs encourage the maintenance of low-density land uses, open spaces, historical features, critical environmental resources, and other sensitive features of the designated sending parcels. When the owner of a sending parcel sells development rights to the owner of a receiving parcel, the purchaser thereby increases the development rights beyond otherwise permissible limits. In this manner, local governments can protect a variety of sensitive features while providing a mechanism to compensate any perceived diminution in land development potential.

TDR programs are consistent with the purpose of the Cape Cod Commission Act and planning efforts at the local government level to further the conservation and preservation of natural and undeveloped areas, wildlife, flora and habitats for endangered species; the preservation of coastal resources including aquaculture; protection of ground water, surface water and ocean water quality, as well as the other natural resources of Cape Cod; balanced economic growth; the provision of adequate capital facilities, including transportation, water supply, and solid, sanitary and hazardous waste disposal facilities; the coordination of the provision of adequate capital facilities with the achievement of other goals; the development of an adequate supply of affordable housing; and the preservation of historical, cultural, archaeological, architectural and recreational values.

2.0 Definitions

2.1 Preservation District. An overlay zoning district established by the Town Meeting/Town Council upon recommendation from the Planning Board as an area in which use or development should be restricted.

2.2 Receiving District. An overlay zoning district established by the Town Meeting/ Town Council upon recommendation from the Planning Board as an area suitable to receive transferred development rights.

2.3 Development Rights. Those rights to develop, expressed as the maximum number of dwelling units per acre for residential parcels or square feet of gross floor area for nonresidential parcels, that could be permitted on a designated sending parcel under the applicable zoning and subdivision rules and regulations in effect on the date of the transfer of development rights. Determination of the maximum number of development rights available for transfer shall be made by the Special Permit Granting Authority as presented in Section 5.2.

2.4 Transfer of Development Rights (TDR). The transfer from a sending parcel to a receiving parcel of development rights.

2.5 Sending Parcel(s). Parcel(s) of land within a Preservation District from which development rights may be transferred.

2.6 Receiving Parcel(s). Parcel(s) of land within a Receiving District to which development rights may be transferred.

2.7 Major Developments. A proposed development project that, due to its size, location or character, could adversely affect the community or region. These developments include:

Subdivision of 15 acres or more;

Development of 15 or more residential lots or dwelling units;

Development of 5 or more business, office or industrial lots;

Commercial development or change of use for buildings greater than 10,000 square feet;

New construction or change of use involving outdoor commercial space of greater than 40,000 square feet.

2.8 SPGA. The special permit granting authority, as set forth in Section 6 of this bylaw.

3.0 Restrictions on Development in Preservation Districts

Land owners who desire to protect sensitive environmental areas may voluntarily sell development rights from sending parcels and enter into permanent development restrictions on those parcels.

If located within a Preservation District, a land owner may either:

3.1 Existing Density Controls

comply with all existing density limitations imposed by regulations adopted by Town Meeting/Town Council as well as those that may be imposed as a condition of a special permit and effective at the time of application for approval of the proposed development;

or

3.2 Permanent Development Restrictions

permanently restrict from future development the land area proposed for development or land area of the same zoning designation within the Preservation District totaling not less than 100% of the total land area of similar quality, character and development potential on which development is proposed.

Upon receipt of a special permit for development within a Preservation District, where such special permit is conditional upon the voluntary, permanent restriction of development rights set forth in Section 3.2, the land owner may sell or otherwise transfer those development rights affected by such restrictions to a Receiving District according to the guidelines of Section 5.0.

4. Major Developments and Restrictions on Development in Preservation Districts

A land owner proposing a Major Development in a Preservation District shall comply with Section 4.1 or 4.2, below.

4.1 Permanent Development Restrictions of Similar Land Area

Permanently restrict from future development land area of the same zoning designation within the Preservation District totaling not less than 100 percent of the total land area of similar quality, character and development potential on which development is proposed.

or

4.2 Permanent Development Restrictions

Upon transfer of the development rights, permanently restrict from future development the land area proposed for development.

5.0 Guidelines for Transfer of Development Rights

5.1 Schedule of Development Rights and Density Bonus Analysis

Subject to approval by the SPGA, development rights from sending parcel(s) may be transferred to receiving parcel(s) proposed by the applicant and identified by assessor's map and approved by the SPGA.

Where the economic development potential, infrastructure capacity and other relevant factors in a receiving parcel are suitable in the judgment of the SPGA to support additional development, the SPGA may award density bonuses up to 1.5 development rights received for each 1 development right transferred from a sending parcel.

5.2 Determination of Development Rights to be Transferred

To establish the development rights available for transfer, the SPGA may require the applicant for residentially zoned land to submit a preliminary or more detailed subdivision plan, as defined by the town's subdivision rules and regulations, to illustrate the number of lots or dwelling units. The SPGA may require the applicant for non-residentially zoned land to submit a site plan showing the square footage available for transfer.

6.0 Districts

6.1 Preservation Districts

Preservation Districts are overlay districts, shown on the zoning map, which include, but are not limited to, the following natural resource areas identified in the Cape Cod Regional Policy Plan and/or the Town's Local Comprehensive Plan.

- Wellhead protection areas.
- Fresh water recharge areas.
- Potential public water supply areas as mapped by the Cape Cod Commission or the Town.
- Land designated under G.L. c. 61, 61A and/or 61B.

- Locations of historic and/or cultural significance. Land areas adjacent to permanently protected open space.
- Land areas providing public access to an ocean, forest or other resource.
- Significant natural resources such as rare species habitat, unfragmented forest areas and similar natural areas deserving inclusion in the Preservation District.

6.2 Receiving Districts

Receiving Districts are overlay districts, shown on the zoning map, in districts/zones in the town defined as a growth activity center by the local comprehensive plan and/or zoning bylaw/ordinance and shall not include any areas included within Section 6.1. The Planning Board, as a condition for designating a Receiving District, shall prepare an infrastructure and timing of construction plan(s) with the location, cost and method of financing infrastructure required by the TDR. This plan shall be adopted by Town Meeting/Town Council as part of the Receiving District designation. Unless otherwise specified by the Town, a Receiving District zoned residential shall not receive development rights from non-residential sending parcels.

7.0 Review by Special Permit Granting Authority (SPGA)

The Planning Board shall be designated as the SPGA under this bylaw. In reviewing a proposed development under this bylaw, the SPGA shall apply this criterion to applications for a special permit under Sections 3 and 4 in addition to other relevant special permit criteria provided for in the zoning bylaw/ordinance.

7.1 The SPGA shall require, as a condition for special permit under this bylaw, where the land owner opts to permanently restrict development in accordance with Section 3.3, that the record owner of sending parcel(s) in the Preservation District record at the Registry of Deeds a conservation restriction running in favor of the town as set forth in Section 9.3.

8.0 Intergovernmental Transfer of Development Rights

8.1 Required Town Action

The Town Meeting/ Town Council of towns in Barnstable County may, by bylaw/ordinance, approve a joint program for TDR including transfers from sending parcel(s) in one town to receiving parcel(s) in another. Such bylaw shall designate which portions of the town will be designated as Receiving Districts for TDR originating from outside the town's corporate boundaries. A town may designate Receiving Districts for inter-town transfers that are the same as, or different from, those designated for intra-town transfers.

8.2 Satisfaction of Transfers of Development Rights

If authorized by the recipient town(s), the TDR authorized by Section 5. may be satisfied by the restriction and transfer of development rights in more than one town.

8.3 Determination of Development Rights to be Transferred

To establish the development rights available for transfer, the SPGA of the recipient town may require the applicant for residentially-zoned land to submit a preliminary or more detailed subdivision plan, as defined by the town's subdivision rules and regulations, to illustrate the number

of lots or dwelling units. The SPGA may require the applicant for non-residentially zoned land to submit a site plan showing the square footage available for transfer.

8.4 Recipient Approval

Inter-town TDRs require a special permit from the SPGA of the town with receiving parcel(s). The SPGA of the town receiving TDRs shall notify the Planning Board of the town from which the development rights are being transferred of the date of the public hearing required by G.L. c. 40A §11, in a manner and time coincident with the SPGA's notification of parties in interest to the special permit public hearing.

9.0 Title Recordation, Tax Assessment and Restriction of Development Rights

9.1 All instruments implementing the transfer of development rights shall be recorded in the manner of a deed in the Registry of Deeds of the jurisdiction for both sending and receiving parcels. The instrument evidencing such TDRs shall specify the lot and block number of the sending parcel(s) and the lot and block number of the receiving parcel(s).

9.2 The clerk of the Registry of Deeds shall transmit to the applicable town assessor(s) for both the sending parcel(s) and receiving parcel(s) all pertinent information required by such assessor to value, assess and tax the respective parcels at their fair market value as enhanced or diminished by the TDRs.

9.3 The record owner of the sending parcel(s) shall, within forty-five (45) days of receipt of a special permit authorizing TDRs, record at the Registry of Deeds a Conservation Restriction as defined by G.L. c. 184 §§31-33 running in favor of the town prohibiting, in perpetuity, the construction, placement or expansion of any new or existing structure or other development on said sending parcel(s). Evidence of said recording shall be transmitted to the Planning Board of the town in which the restriction has been placed, indicating the date of recording and deed book and page number at which the recording can be located. The grant of the special permit to transfer development rights shall be conditioned upon such restriction, and no special permit for a transfer of development rights shall be effective until the restriction noted above has been recorded at the Registry of Deeds.

10.0 Severability:

10.1 If any provision of this bylaw is held invalid by a court of competent jurisdiction, the remainder of the bylaw shall not be affected thereby. The invalidity of any section or sections or parts of any section or sections of this bylaw shall not affect the validity of the remainder of the [town]'s zoning bylaw.

The New Jersey Pinelands Commission (Adopted)

Density Transfer: The Pinelands Experience

By Larry Liggett, Manager, Planning & Research, New Jersey Pinelands Commission

In 1996 the state Legislature amended the Municipal Land Use Law (MLUL) to give municipalities another growth management tool. The amendment permits towns to pass ordinances that will allow developers to meet minimum lot size and density requirements by using off-site lands to cluster additional development in planned developments. For example, the developer of a 100-acre lot in a two-acre zone is allowed to build 50 homes. To develop more units, he can buy land adjacent or elsewhere in the zone and transfer the density to his original 100-acre parcel. Or he can purchase development rights as easements rather than outright land purchase from another parcel of land and transfer these. Both are forms of transfer of development rights, usually called TDR.

For 18 years, the Pinelands Commission has had a regional density transfer program that permits inter-municipal transfers from conservation areas to growth areas using "Pinelands Development Credits" (PDCs). Within the framework of the Comprehensive Management Plan, the Pinelands Commission awards PDCs in certain critical areas that can be used to permit bonus densities in less critical areas. To date, this transfer program has protected more than 13,000 acres in the conservation areas.

Based upon a Weymouth Township (Atlantic) initiative and a desire to reduce waivers (the Pinelands equivalent of municipal variances) for undersized lots, the Pinelands Commission established a new program in 1992 that requires municipalities to establish similar, local or intra- municipal, off-site density transfer programs within two Pinelands management areas. (Similar to municipal zones, there are nine management areas in the Pinelands.) The two management areas affected, the Rural Development Area and the Forest Area, contain most of the forested lands that the regional TDR program does not already cover. The local program addresses existing undersized lots and expands the program to serve newly subdivided lots. In view of the changes to the MLUL that allow all municipalities similar powers, the experience of the Pinelands municipalities is worth examining.

Twenty-three municipalities in the Pinelands have regional programs and to date, 14 municipalities have transferred 1,480 development rights for homes to increase density at developments that approximate planned developments. In addition, 34 municipalities in the Pinelands have local programs and to date, seven municipalities have received roughly 40 development applications (mostly for individual single-family dwellings) for such transfers. This article reflects the experiences of both the regional and the local programs.

First, some terminology. The building lot can be called a "mother" lot. The off-site lands whose development rights transferred, are "out parcel" lots, which have deed restrictions against further

development. The area where the density is allowed to be increased through a transfer program is the "receiving area." The lands permitted to be used for meeting the off-site density are the "sending area."

Is having receiving areas worthwhile?

A density transfer program can operate within a zone (or even between zones). The municipality plans the zone's overall density, which is enforced through local ordinances. The benefit comes from being able to target clustering a significant portion of the density in the receiving area. In addition, to be able to concentrate as many units in the zone as possible, the number of lots in the receiving area must reflect the zone size. For example, a zone with 1,000 vacant acres with a minimum lot size of five acres allows 200 houses to be built. A receiving area within the zone designed to meet most of the zone's development potential should contain enough acreage for roughly 200 lots. (Not everybody will want, or be able, to transfer density nor will everybody be able to receive density. Therefore, having more receiving lots than sending opportunities is desirable.)

The locations designated for more intensive use in planned developments should be next to existing developed areas, near transportation and other infrastructure. Without infrastructure, the receiving zone will not work. Receiving areas should not be located in sensitive watersheds or in areas with other significant environmental constraints.

Is Specifying a Sending Area Advisable?

From an environmental standpoint, the answer is emphatically yes! The township will be able to target what it wants preserved. Without a sending area, the preserved lands will be scattered and piecemeal. No particular area will be preserved unless it is a natural from a marketing standpoint (for example, an area with a great deal of wetlands).

A developer generally sees establishing sending areas as an unwelcome complication because it limits his flexibility. Municipalities should craft sending areas carefully to minimize complications. Sending areas may limit the buyer's market. Therefore, the town must be sure it has enough sellers so no one seller has a monopoly. The sending area must be big enough to serve the likely demand for the program, and reflect that not everybody in the sending area will sell. The municipality must be able to justify the sending area boundary, both when it adopts it and when an applicant owns or can easily buy lands not in the designated sending area.

How do you ensure maintenance of out-parcel lots?

A key is what uses are permitted on the lots whose development rights are sold. The uses must be limited but should not preclude all use. Depending on its goals, the program can accommodate agriculture, forestry and passive recreation. Linking such lots to an existing or new conservancy

organization can provide stewardship. However, these measures will not answer all situations and it may be desirable to link the ownership of the mother lot and out parcel. (See discussion of linking in Tax Issues below).

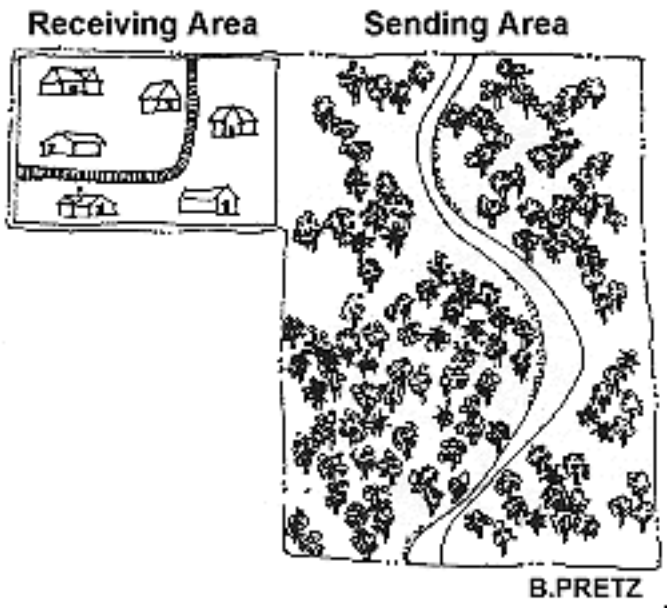
What are other technical details or problems?

Size of Receiving Lots. In part, the size of the receiving lots depends upon whether they will be sewered. Smaller lots provide for more clustering, resulting in preservation of more land. However they must also be subject to community norms. For example, to maintain water quality in the Pinelands, one unit per acre is the minimum permitted size in receiving areas served by septic systems. Sewer service areas may have up to eight dwelling units per acre. These densities will vary in other parts of the state under different conditions.

Tax Issues. Many municipalities will be worried about the tax status of the out-parcel lots. For example, if taxes are not paid, can the owner(s) of the mother lot(s) be held responsible? It's preferable to find someone to take care of the out-parcel lot. A neighbor such as a farmer or a group of neighboring homeowners, a local or statewide conservancy or the municipality can be the responsible party. If no one is willing, the mother and out-parcel lots can be tied together in one master lot as one item on the tax list. This permits ease of taxing and ease of enforcement for taxes and maintenance on either lot. The difficulty comes if the receiving area is subdivided, unless a homeowners' association or another vehicle links the lands.

The assessor determines the amount of tax revenues from the mother lot and the out-parcel by their value as building lots. Combining them in one tax line or keeping them as two (a more intense building lot and a deed-restricted unbuildable lot) probably should retain the amount of taxes collected because the number of building lots has not changed. Even if the taxes are slightly less due to the smaller lots on the receiving lot, when the new development is built the taxes should more than make up for any minor loss.

Easement vs. Fee Simple Purchase. This more complex question has no simple answer. Holding the out-parcels in fee (unconditional ownership) guarantees single responsibility, taxes and ease in tracking. It does raise the question whether the out-parcel lot can be sold. (If someone can use it at the reduced, deed-restricted level, he or she should be permitted to buy it.) Also, having a homeowners' association or a group of businesses responsible for some out parcels is a problem. Conversely, if a development-restricting easement is purchased, the original owner retains title and presumably can use it for one of the limited uses mentioned above, such as farming.



If development rights of a sending area have been used, de-linking the two parcels has merit. Then, the municipality, conservancy or other nonprofit can take over the maintenance and use of the out-parcel lots. Most applicants developing the mother lot will want to sell the out-parcel lot to avoid the responsibility of maintenance. Without a sending area and a guaranteed out-parcel user, de-linking is probably inadvisable.

Subdivision on Partially Used Sending Lots. Someone with a large sending lot (for example, containing substantial wetlands) might want to sell a piece of the lot to developers of planned developments. However, subdivision with full property surveys to define what is being sold is expensive and may hamper the program. An unsurveyed metes and bounds description may be adequate without full subdivision if evidence in the deed or elsewhere shows that the sending lot has sufficient acreage for sending. However, subdivision is still best.

Interzone Transfers. In addition to off-site clustering within a zone, clustering between zones may be possible. For example, a municipality can create a planned center with one- acre zoning around the center, a five-acre zone around that, and then a farm zone with density of one dwelling unit per 20 acres. It may be better to cluster all or most of the development from the five and 20 acre zones in the one acre zone. This interzone transfer is done occasionally in the Pinelands (at some cost in terms of further complexity), by prorating the densities between zones. In the case above, a 25-acre lot in the one-acre zone could be subdivided for more than 25 homes if units were transferred from the other two less dense zones at the rate of one unit for every five acres preserved in the five acre zone and one unit for every 20 acres in the 20-acre zone. The municipality must set a maximum density in the receiving zone.

Can portions of non-residential zones be saved?

The Pinelands does not have density transfer for non-residential development, because it does not have non- residential intensity standards other than area requirements for septic dilution in unsewered areas. If a municipality wanted to preserve a portion of a zone that hs a set floor area ratio or impervious surface ratio, it also could allow transfer of the intensity of non-residential use. Again, the transfer must be with a planned development.

Linking Sellers and Buyers. If the local real estate community understands the program, hopefully it will match buyers to sellers. For the regional program in the Pinelands, a public bank performed this task and other functions, because the million-acre Pinelands has many different real estate markets. The Pinelands Development Credits are privately traded, with the market setting the transaction prices. With well-drawn ordinances and sufficient training of all involved --land use officials, assessors, lawyers, real estate professionals --an additional outside broker is not necessary for a municipal program.

The benefits and costs

The municipality has the benefit of clustered development, which is cheaper than sprawl to serve with public infrastructure. It also obtains open space and environmental protection of the lands it selects. The town keeps its build-out according to municipal plans. Its tax-foreclosed lots can provide a source of revenue if used as sending or receiving areas. Pressures to rezone near existing development may be lessened by making such an area a receiving area. This would permit planned development with no net increase in municipal build-out, rather than a new development area, which would result in an increase in municipal build-out.

The owners of receiving lots obtain a clear mechanism to develop their well-situated lots. Owners of land next to developed areas obtain a right to develop more intensely, albeit at some cost.

The owners of sending lots obtain a new use that may mitigate some of the hardship of environmental or other constraints on their properties. It offers both preservation of land and financial return for landowners.

The costs arise mostly from the complex process that an applicant must enter to find land, and the tracking system of deed restricted lands that the municipality must maintain. In addition, to preserve environmentally constrained lands by transferring their entire density, the number of houses built might be more than would otherwise have been expected (but not more than the theoretical and planned yield of the zone).

Which Pinelands communities have experience in such programs?

Plumsted (Ocean County), Mullica, Buena Vista, Hamilton and Weymouth (Atlantic), and Evesham and Pemberton Townships (Burlington) have some experience with the local program that serves undersized lots. Weymouth has been dealing with the concept longer than the others (roughly, 17 of the 40 cases to date).

Given the focus of the MLUL on planned developments, it may be more useful to examine the experience of Pinelands municipalities that have used the regional Pinelands Development Credit (PDC) program. Eight Pinelands municipalities have substantial experience in the regional PDC program: Egg Harbor, Galloway, and Hamilton Townships (Atlantic), Medford and Pemberton Townships (Burlington), Monroe (Gloucester), and Winslow and Waterford Townships (Camden).

Boulder County, Colorado (Adopted)

Boulder County has a successful transfer of development rights program. The County is ___ square miles in area, with a 19__ population of 225,000 (including the City of Boulder).

Planned Unit Development Districts

6-700 Transferred Development Rights Planned Unit Development

(A) Purpose: To promote county-wide preservation of agriculture, rural open space and character, scenic vistas, natural features, and environmental resources for the benefit of the residents of Boulder County. The preservation and maintenance of these resources will be ensured by encouraging county wide land use planning including the perpetuation of large areas of generally contiguous properties suitable for agricultural use through the transfer of development rights from parcels suitable for preservation to properties meeting the criteria for development.

(B) Designation of Areas to be Preserved: The sending sites to be preserved and protected through the application of this article are those designated on the Boulder County TDR Sending Sites Map.

(C) Areas to be Developed Utilizing Development Rights Transferred From a Sending Site: The areas which are suitable for development using the density transferred from the sending sites must meet the criteria and standards for approval defined in 6-700(E) and (G), below. These areas are referred to as receiving sites.

(D) Zoning Requirements: The uses approved as part of a TDR/PUD shall be limited to the following:

(1) Density, uses, minimum lot area, minimum receiving land area, building height, and yard requirements shall be determined at the TDR/PUD sketch plan approval. The receiving site will include 2 units per 35 acres plus the density transferred to the site.

(2) The maximum allowable total units within a TDR/PUD shall be 200.

(E) Development Criteria for Receiving Sites which Accept Transferred Development Rights

(1) In order to be eligible for additional density from development rights, a property-owner must apply for and receive approval for a TDR/PUD on the parcel.

(2) Adequate facilities and services must be provided to serve a TDR/PUD development.

(3) Defined Subareas for transfer - For every TDR/PUD, 75% of the total number of development rights needed to complete the project must be acquired from designated sending sites located in the same subarea as the proposed receiving site unless the applicant proposes a specifically defined and identified sending area which is designated by the BOCC in the TDR/PUD approval.

(F) Development Criteria for Sending Sites from which Development Rights are Transferred

(1) Parcels eligible for the density transfer option must be located within approved sending areas, as depicted on Boulder County TDR Sending Sites Map.

(2) In no case shall the developed acreage of a sending site exceed 5% of the total area of the sending site, and the conservation easement shall cover all of the sending site area.

(3) The conservation easement, pursuant to C.R.S. 38-30.5-101 through 38-30.5-110, or other acceptable means are effected to prevent further subdivision or development of lands committed for agriculture or other open uses.

(4) Units which have been expressly banked as unutilized density through an approved and recorded NUPUD or NCNUPUD, may be eligible to participate in a TDR/PUD if the Commissioners determine that participation enhances the preservation of the sending site, and otherwise furthers the purposes of this Section 6-700 and the Comprehensive Plan. Any such banked units which are not proposed or approved for use in a TDR/PUD, can still be platted as part of an NUPUD or NCNUPUD application provided that all regulations in effect at the time of the application are met.

(5) Units which have not been expressly banked as required in the preceding subsection, and which are merely units not utilized in or approved as part of a NUPUD or NCNUPUD application, may not be held and used as part of a TDR/PUD.

(6) Units proposed for transfer from sending sites which have been acquired in fee by a governmental entity for the preservation purposes listed in Section 6-700(A), above, or from sending sites encumbered by a conservation easement held by a governmental entity for the preservation purposes listed in Section 6-700(A), above, will be eligible for participation in a TDR/PUD only if the Commissioners determine that the proposal for participation enhances the preservation of the sending site and otherwise furthers the purposes of this Section 6-700 and the Comprehensive Plan. If such a determination is made, participation in a TDR/PUD will not require a separate conservation easement to be granted to the County over the sending site, unless the Commissioners determine that a separate easement is necessary to assure the long-term preservation of the sending site on substantially the same terms as the Conservation Easement form approved by the County for use in these TDR/PUD regulations.

(G) Standards and Conditions of Approval for Development on a Receiving Site: A PUD utilizing transferred development rights shall be approved only if the Board of County Commissioners finds that the proposed development meets the following standards and conditions:

(1) The proposed TDR/PUD must be adjacent to and compatible with adjoining development and land uses, as well as compatible with the land uses designated for the area in adopted municipal master or comprehensive plans.

(2) The proposal must be located adjacent to a major arterial, collector, or transit route.

(3) Except as provided in 6-700(G)(7), below, receiving sites shall not be located on national significant agricultural land, designated open space, environmentally sensitive lands, or critical wildlife habitats or corridors, as identified in the Comprehensive Plan.

(4) Within any TDR/PUD not more than 5% of the total land area may be developed for structural nonresidential uses.

(5) The nonresidential portions of any TDR/PUD will not be issued a Certificate of Occupancy until such time as 75% of the residential portions of the development are complete.

(6) The proposed development shall include, where appropriate, methods to contribute to the costs for the provision of capital facilities including schools.

(7) Exceptions to the above approval criteria may be granted by the Board of County Commissioners if the following conditions apply:

(a) The proposed project is located within an approved Community Service Area, or

(b) The proposed project is located adjacent to an existing subdivision which is developed at greater than rural density.

(H) Development Standards for Sending Sites

(1) Principal and accessory uses will be determined through the establishment of a conservation easement pursuant to the provisions of this Article following a form approved by Boulder County.

(2) Property owners choosing not to participate in the transfer of development program still may utilize the use by right of one residential unit per 35 acres.

(3) The potential number of development rights available for transfer from sending sites and the number of building lots permitted on sending sites participating in the transfer density program is as follows:

(a) For parcels between 35 and 52.49 acres

(i) two development rights can be sent; OR

(ii) one unit may be sent AND one unit may be built on site, but only if specifically approved by the Commissioners based on a finding that the proposal enhances the preservation of the sending site and otherwise furthers the purposes of this Section 6-700 and the Comprehensive Plan.

(b) For parcels between 52.5 and 69.9 acres

(i) three development rights can be sent; OR

(ii) two units may be sent AND one unit may be built on site, but only if specifically approved by the Commissioners based on a finding that the proposal enhances the preservation of the sending site, and otherwise furthers the purposes of this Section 6-700 and the Comprehensive Plan.

(c) For parcels between 70 and 87.49 acres

(i) four development rights can be sent; OR

(ii) three rights can be sent AND one unit may be built on site

(d) For parcels between 87.5 and 104.9 acres

(i) five development rights can be sent; OR

(ii) four rights can be sent AND one unit built on site

(e) For parcels between 105 and 122.49 acres

(i) six development rights can be sent; OR

(ii) five rights can be sent AND one built on site

(f) For parcels between 122.5 and 139.9 acres

(i) Seven development rights can be sent; OR

(ii) six development rights can be sent AND one built on site

(g) For parcels 140 acres and larger

(i) two development rights per 35 acres can be sent; OR

(ii) any combination of transfer and on site development which does not exceed two units per 35 acres transferred or one unit per 70 acres on site (i.e., on 140 acres there could be the transfer of 6 units and the construction on site of 2 units).

(4) Sending sites which have deliverable agricultural water rights in an annual average amount of 1 1/2 acre feet per acre or more attached to, available for use on, or used on a significant portion (generally considered to be 75%) of the property, for at least 5 years prior to August 17, 1994, shall receive an additional unit of density for each 35 acres irrigated. This may be exercised only through the sending of that unit to a recognized receiving site. This additional unit shall be made available if the owner provides the County an undivided interest in the water rights which have been historically applied to the sending site as set forth in this subsection.

(5) Verification of sending site acreage through a survey will be required if the property is within 5% of the minimum acreage needed to eligible for an development right.

(I) Procedure for Obtaining Transferred Development Rights

(1) Development rights may be transferred to an approved receiving site only after the applicant obtains a Development Right Certificate for each right to be utilized from an eligible sending site.

(a) A Development Right Certificate will be issued by the Boulder County Land Use Department upon the conveyance of a Conservation Easement to the County on the sending site. A Conservation Easement will not be required only under the circumstances provided in Section 6-700(F)(6), above.

(b) The Conservation Easement, which defines the limitation on the development of the sending site, including the number of development rights severed from that parcel,

shall be recorded in the real property records for that sending site at the office of the Boulder County Clerk and Recorder.

(c) Any remaining development rights shall be built only after the sending parcel goes through the proper process for establishment of location of buildings or lots as follows:

(i) Development of one right must be on the undivided sending site and requires Site Plan Review (see Article 4-800).

(ii) Development of two or three rights requires a Subdivision Exemption (see Article 9) if separate lots are being created, or PUD approval if separate lots are not being created.

(iii) Development of more than three rights requires a Subdivision and/or PUD approval, as applicable, if separate lots are being created, or PUD approval if separate lots are not being created (see Articles 5 and 6).

(2) The receiving site may be established by a conceptual plan, including location, size and general development parameters, submitted by the applicant and approved by the Board of County Commissioners after review and recommendation by the Planning Commission. A sketch plan will be required following the conceptual plan approval or in lieu of submittal of a conceptual plan.

(3) A TDR/PUD approval shall also require a preliminary plat which shall be submitted by the applicant and approved by the Board of County Commissioners after review and recommendation by the Planning Commission.

(4) The final plat will only plat and record the number of lots for which all of the development rights have been acquired and documented by Development Right Certificates.

(a) Prior to the acquisition of all development rights approved on a receivingparcel, the final plat will only define the rights utilized in each block. Building permits will not be issued for development using those rights platted in blocks until an amendment to the TDR/PUD, including an amended final plat, is approved.

(b) Improvements directly related to the block for which some or all of the lots have been platted, must be complete or adequately guaranteed prior to the issuance of building permits.

(J) The following parcels will not be considered for a TDR/PUD:

(1) Parcels of less than 35 acres, unless the parcel is adjacent to an approved sending site or an approved conservation easement so that the total land area committed to agricultural or other open space use is at least 35 acres.

(2) An approved subdivision lot recorded prior to August 17, 1994, the date of the first public notice of Planning Commission consideration of these regulations.

(3) Parcels of LESS than 70 acres created after August 17, 1994, will only be eligible for development rights at the base density of the zoning district in which the parcel is located. No additional development rights may be granted to those parcels.

6-800 Conservation Easement

(A) Before the Board of County Commissioners may approve a NUPUD, a NCNUPUD, or a TDR/PUD the applicant shall agree to grant to Boulder County a conservation easement in gross pursuant to Article 30.5 of Title 38, C.R.S., as amended, protecting the preserved land from development in accordance with the approved preservation purposes. Conservation easements on required outlots shall provide for long-term preservation and appropriate management of the resource and shall be granted in perpetuity, subject to transfer or termination only pursuant to the express terms of these regulations and the governing easement grant.

(B) The conservation easement shall include the following terms:

(1) The easement shall limit future County transfer, or termination of the easement to situations where:

(a) the proposed development and/or land use is consistent with the current Comprehensive Plan and this Code; or

(b) the proposed development and/or land use is consistent with a management or land use plan contractually agreed to by the County and other interested governmental entity; or

(c) in situations where the proposed transfer or termination is not in accordance with an intergovernmental land use or management plan under subsection (b) above, the County may require compensation from the transfer proponent or potential recipient in an amount sufficient to offset any loss of the resource being preserved or protected by the easement. Determination of the amount and form of compensation shall be made on a case-by-case basis.

(2) Where the easement is proposed for transfer, the following additional requirements shall apply:

(a) the recipient of any transferred interests must be a governmental entity, or a charitable organization, exempt under Section 501(c)(3) of the Internal Revenue Code of 1954, created at least two years prior to the proposed transaction and/or the owner of fee title; and

(b) where the easement is not transferred to the owner of fee title, the County will require either the consent of the owner or compensation to the owner in an amount satisfactory to the parties, less the costs of transfer.

(3) The preserved area shall be managed as a single agricultural unit, except where multiple outlots are approved or where areas are specifically withdrawn from or are unsuitable for agricultural uses. These areas would include natural areas, wildlife preserves, trails, or other identified environmental or open lands resources.

(4) No conservation easement shall be released for development until the developer satisfies the current land dedication requirements benefiting the residential area of the NUPUD or NCNUPUD. The developer shall satisfy these requirements either by dedicating land from the easement, or in some other manner which meets the applicable dedication requirements.

(5) The conservation easement for a TDR/PUD sending site shall include a reference to the extinguishment of the development rights transferred off that site. If additional rights are transferred after the recordation of the conservation easement, the easement shall be amended to reflect the extinguishment of those additional rights and recorded.

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